

Message Text

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ORIGIN AID-05

INFO OCT-01 AF-08 ISO-00 EB-07 /021 R

DRAFTED BY AA/AFR:WHNORTH AND GC:WEWARREN

APPROVED BY AA/AFR:WHNORTH

AFR/SFWA:DSHEAR(DRAFT)

AFR/DP:CWARD(SUBSTANCE)

AFR/DR/SFWA:JKELLY(SUBSTANCE)

GC/AFR:EADRAGON(DRAFT)

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FM SECSTATE WASHDC

TO AMEMBASSY ABIDJAN IMMEDIATE

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NORTH AND WARREN TO MILLER

E.O. 11652:N/A

TAGS:

SUBJECT: ENTENTE FUND NEGOTIATIONS

REFS: (A) TISA/CRAWFORD TELECON AUGUST 9; (B) STATE 198599; (C) ABIDJAN 7437; (D) ABIDJAN 5936; (E) ABIDJAN 5908; (F) STATE 183508; (G) STATE 160352; (H) ABIDJAN7107 AND (I) ABIDJAN 6411

1. DECISION EXPRESSED REFS A AND B MADE AFTER CAREFUL CONSIDERATION, BY ALL CONCERNED OFFICES, OF OUTSTANDING ISSUES IDENTIFIED BY REDSO IN REFS C, D AND E AND JUDGMENT REGARDING APPROPRIATE USE OF LEGAL SERVICES AVAILABLE TO BUREAU AND AGENCY DURING TQ. FYI; GC/AFR PRESENTLY FUNCTIONING WITH TWO LAWYERS AND GC PRESENTLY FILLING SIX LEGAL POSITIONS END FYI.

2. AID/W CONFIDENT REDSO (ACTING DIRECTOR MILLER, VAN RAALTE, CRAWFORD AND LAWYER LORIS) FULLY CAPABLE TO UNCLASSIFIED

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HANDLE THE ISSUES IDENTIFIED BY REDSO REFS C, D, AND E.

REDSO DIRECTOR WEDEMAN BEFORE GOING ON LEAVE FOR SUMMER EXPRESSED SAME VIEW IN MEETING EARLY JULY REGARDING NEGOTIATIONS WITH EF CONDUCTED IN JUNE.

3. THE FOLLOWING IS A REVIEW OF OUTSTANDING ISSUES (WHICH ARE NOT CONSIDERED UNUSUALLY COMPLEX BY AID/W), POSITION OF EF AND AID/W GUIDANCE.

A. INTEREST ON GRANT FUNDS: EF WISHES TO USE INTEREST EARNED ON GRANT FUNDS BETWEEN THE TIME OF DISBURSEMENT OF FUNDS (ADVANCE) BY AID AND USE FOR PROJECT PURPOSE. EF HAS BEEN ADVISED REPEATEDLY IN THESE NEGOTIATIONS (PARA 3G REF G, PARA 4 REF F, AND REF A) THAT US LAW REQUIRES ANY SUCH INTEREST, IF EARNED, TO BE RETURNED TO THE US TREASURY. AID DOES NOT HAVE LEGAL AUTHORITY TO ACCEDE TO EF DEMAND. PRUDENT MONEY MANAGEMENT (AND TREASURY CIRCULAR 1075 POUCHED TO REDSO) REQUIRES THAT ADVANCES BE TIMED AS CLOSELY AS POSSIBLE TO THE TIME THE FUNDS ARE ACTUALLY NEEDED BY A GRANTEE FOR PROJECT DISBURSEMENTS SO THAT LITTLE OR NO INTEREST EARNED. IN FACT REIMBURSEMENT FOR EXPENDITURES, RATHER THAN ADVANCES, PREFERRED PAYMENT METHOD AND CLAUSE RE INTEREST MAY BE OMITTED IF NO ADVANCES ARE MADE TO THE EF. AID/W FULLY UNDERSTANDS EF CONCERN, PARA 4 REF G, REGARDING ANY ATTEMPT BY AID TO ENFORCE RETROACTIVELY THE RETURN TO US OF INTEREST EARNED ON EARLIER GRANTS THAT DID NOT CONTAIN PROVISION REGARDING RETURN TO US OF SUCH INTEREST. AID/W BELIEVES THAT DUTY WAS ON AID TO INFORM EF OF SUCH A LEGAL REQUIREMENT AND TO INCLUDE APPROPRIATE CLAUSE IN GRANT AGREEMENT. FAILURE BY AID TO DO THAT RAISES SUBSTANTIAL ARGUMENTS OF EQUITY AND FAIRNESS AGAINST ATTEMPTING TO RECOVER ANY INTEREST EARNED UNDER PRIOR GRANTS TO WHICH AID/W IS VERY SYMPATHETIC. AID/W DOES NOT INTEND TO ATTEMPT TO RECOVER FROM EF INTEREST EARNED ON PRIOR GRANTS UNLESS AID IS CLEARLY REQUIRED TO DO SO BY US LAW. LEGAL DUTY OF AID TO ATTEMPT SUCH RECOVERY NOT QUITE CLEAR ALTHOUGH A PRELIMINARY INVESTIGATION OF THE LAW HAS DISCLOSED A DECISION OF THE COMPTROLLER GENERAL (42 CG 289 (1962) AT PAGE 295-POUCHED TO REDSO) IN WHICH THE COMPTROLLER GENERAL STATED QUOTE HOWEVER, IN VIEW OF UNCLASSIFIED

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THE CIRCUMSTANCES INVOLVED HERE, WE WILL NOT REQUIRE RECOVERY OF THE INTEREST OR OTHER ACCRUALS HERETOFORE EARNED ON GRANT-INAID FUNDS PROVIDED UNDER AGREEMENTS WHICH EITHER AUTHORIZED SUCH INTEREST TO BE USED BY THE GRANTEE OR FAILED TO PROVIDE FOR PAYMENT THEREOF TO THE UNITED STATES. UNQUOTE. (TISA ADVISED CRAWFORD OF THIS REF A). A THOROUGH EXAMINATION OF THE LAW, WHICH WILL TAKE TIME, WILL BE NECESSARY BEFORE AID CAN COMPLETELY

ASSURE NO EFFORT WILL BE MADE TO RECOVER INTEREST EARNED ON EARLIER GRANTS. IRRESPECTIVE OF THE OUTCOME OF THIS EXAMINATION OF LAW, HOWEVER, IT WILL BE NECESSARY FOR THE PROVISION REQUIRING THE RETURN OF INTEREST TO THE US TO BE INC- UDED IN THE GRANT AGREEMENTS BEING NEGOTIATED AND IT WILL SERVE NO USEFUL PURPOSE TO DELAY EXECUTION OF THE GRANT AGREEMENTS BEING NEGOTIATED.

B. PROCUREMENT FROM BLOC COUNTRIES: AS POINTED OUT PARA

4 REF F PROCUREMENT BY MEMBER STATES WITH THEIR OWN FUNDS OF GOODS OR SERVICES FOR THE PROJECT FROM COMMERCIAL SOURCES IN BLOC COUNTRIES ON COMMERCIAL TERMS IS AS FAR AS WE CAN GO IN ACCORDANCE WITH SECTION 620(H) FAA AND M.O. 1018.9. IF PROCUREMENT FROM BLOC SOURCES ON CONCES- SIONAL TERMS IS DESIRED, A WAIVER IS REQUIRED WITH RESPECT TO A PARTICULAR PROCUREMENT DESCRIBED AND JUSTIFIED IN ACCORDANCE WITH MO. 1018.9.

C. STANDARD PROVISIONS FOR CAPITAL GRANTS: MINGES INSISTS THAT STANDARD PROVISIONS OF TA GRANTS SHOULD BE USED FOR CAPITAL GRANT. HOWEVER, STANDARD PROVISIONS FOR CAPITAL AGREEMENTS FOUND IN AID LOAN AGREEMENTS. HISTORI- CALLY THIS IS TRUE BECAUSE MOST CAPITAL PROJECTS ARE FUNDED BY LOANS RATHER THAN GRANTS. HOWEVER, WHEN CAPITAL PROJECT GRANT FUNDED, STANDARD TERMS TAKEN FROM LOAN AGREEMENT EXCEPT FOR LOAN REPAYMENT PROVISIONS AND DEFAULT PRO- VISIONS REGARDING NONPAYMENT AND ACCELERATION OF DEBT. (SEE PARA I.B. OF M.O. 1262.1 WHICH STATES QUOTE CAPITAL ASSISTANCE AGREEMENTS (GRANT) AND CAPITAL ASSISTANCE AGREEMENTS (LOAN) DIFFER PRINCIPALLY IN THAT THE LATTER INCLUDES PROVISIONS RELATING TO REPAYMENT. UNQUOTE) MINGES HAS BEEN INFORMED OF THIS FACT BUT NEVERTHELESS INSISTS THAT THE GRANTEE WILL DECIDE THAT STANDARD PRO- UNCLASSIFIED

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VISIONS OF TA GRANTS WILL BE USED IN THESE CAPITAL AGREE- MENTS. AID, HOWEVER, IS THE GRANTOR OF U.S. FUNDS, AND AID WILL DECIDE WHICH STANDARD PROVISIONS ARE NECESSARY FOR PROTECTION OF ITS INTERESTS IN A CAPITAL PROJECT. IT IS INTERESTING TO NOTE THAT THE STANDARD PROVISIONS TO WHICH MINGES MAKES SUCH STRONG OBJECTION ARE THE SAME PROVISIONS AS THOSE TO WHICH THE EF AND MEMBER STATES HAVE AGREED IN THE OUTSTANDING CAPITAL LOAN AGREE- MENTS BETWEEN EF AND AID. THESE PROVISIONS ARE NOT NEW TO THE EF, HAVE BEEN ACCEPTABLE IN THE PAST AND NO OBJEC- TION HAS BEEN RAISED TO THEM IN THE LOAN AGREEMENTS FOR THE LIVESTOCK AND FOOD PRODUCTION PROJECTS. FYI: IT WOULD BE APPROPRIATE FOR THE EF AND AID TO NEGOTIATE SPECIFIC LANGUAGE OF STANDARD PROVISIONS WHICH MAY BE OFFENSIVE TO EXPRESS THE PROVISION IN A MORE MUTUAL AND ACCEPTABLE

WAY PROVIDED THAT THE SUBSTANCE OF EACH PROVISION IS MAINTAINED AND AID'S LEGITIMATE INTERESTS PROTECTED. IT IS NOT ACCEPTABLE, HOWEVER, TO DELETE WHOLE PROVISIONS OR TO CHANGE THEIR MEANING . END FYI.

4. THESE PROVISIONS ARE USED ALL OVER THE AID WORLD AND HAVE BEEN ACCEPTED BY EF IN THE PAST. TO INSIST THAT THESE PROVISIONS BE DELETED AND TO DELAY OR REFUSE TO EXECUTE THE AGREEMENTS BECAUSE OF THESE PROVISIONS RAISES

QUESTIONS WHETHER THE POSITIONS TAKEN BY EF IN THESE NEGOTIATIONS ARE REALLY IN THE BEST INTERESTS OF EF AND WHETHER ANOTHER LAWYER IS REALLY WHAT IS NEEDED TO MOVE THESE AGREEMENTS TO EXECUTION.

5. IT MAY BE USEFUL TO POINT OUT DIRECTLY TO KAYA RATHER THAN MINGES THAT AID/W IS SURPRISED AND VERY CONCERNED THAT THESE ISSUES ARE DELAYING EXECUTION. KAYA HAS CONTINUING INTEREST IN OPERATIONS OF EF, WHEREAS MINGES MAY BE LEAVING SOON. MOREOVER THE APPROPRIATIONS ACT REQUIRES THAT 80 PERCENT OF FY 76 GRANT FUNDS BY FUNCTIONAL CATEGORY BE OBLIGATED BY 31 AUGUST. THE AMOUNT, OF THESE GRANTS, \$7.9 MILLION, IS ALMOST 20 PERCENT OF AFR FY 76 FN FUNDS. THERE ARE OTHER GRANT PROJECTS PRESENTLY BEING DESIGNED AND PLANNED FOR SEPTEMBER OBLIGATIONS SO THAT IT IS NOT ALTOGETHER CLEAR
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WHETHER THE FUNDS WILL BE AVAILABLE FOR LIVESTOCK AND FOOD PRODUCTION GRANT OBLIGATIONS IN SEPTEMBER. IN THIS REGARD SHEAR WILL BE CALLING KAYA RE AID'S CONCERN OVER PROBLEMS IN CONCLUDING THESE NEGOTIATIONS.

6. IF THE GRANT AGREEMENTS ARE NOT EXECUTED BECAUSE OF THESE ISSUES DURING THE TQ, IT WILL BE NECESSARY FOR AID/W TO REVIEW THE NEGOTIATIONS CAREFULLY TO DETERMINE WHETHER, AFTER FOUR MONTHS OF NEGOTIATION, REAL PROGRESS CAN BE MADE IN FY 1977. IT WILL ALSO BE NECESSARY TO DECIDE WHETHER TO GO BACK TO THE ADMINISTRATOR AND THE CONGRESS FOR A THIRD TIME AND FACE THE POSSIBILITY THAT QUESTIONS MAY BE ASKED REGARDING WHY THE AGREEMENTS HAVE NOT YET BEEN EXECUTED. THE RESPONSE WOULD HAVE TO BE THAT THE EF REFUSES TO ACCEPT A PROVISION REQUIRED BY US LAW (RETURNING INTEREST) WANTS TO PROCURE IN BLOC COUNTRIES ON CONCESSIONAL TERMS, AND NOW FINDS AID STANDARD TERMS UNACCEPTABLE WHEN THEY WERE ACCEPTABLE IN PAST LOAN AGREEMENTS AND ARE USED WORLDWIDE.

7. TISA WILL CALL REDSO AT 9:30 AM (WASHINGTON TIME) TUESDAY, AUGUST 17, TO DISCUSS ISSUES WITH REPRESENTATIVES

OF REDSO AND EF. PLEASE ADVISE BY CABLE IF THAT TIME NOT
CONVENIENT TO REDSO OR EF AND INDICATE CONVENIENT TIME
AND DATE. KISSINGER

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